

Case No. 561-0

This is a complaint filed by a unit owner in a homeowners association against the association on March 10, 2002. The Complainant seeks access to the rear of his townhouse property over common areas owned by the association. Access immediately to the rear of Complainant's property is over a pathway which Complainant desires to maintain at his own expense. The association has not maintained this pathway during the approximately 30 years of its existence, and it does not desire to maintain it or have it maintained by Complainant. The association has advised the Complainant

to remove the improvements which he has made to the pathway without prior approval. The survey by Snyder & Associates dated May 1, 2002 (R-97) shows the area in question and is attached to this Decision and Order as Exhibit A.

#### **FINDINGS OF FACT**

1. The Complainant Michael Grinkrug is the record owner of 10849 Deborah Drive, Potomac, Maryland 20854, also known as Lot 47, Block K Inverness Forest, Plat Book 93, Plat No. 10164. See Exhibit A hereto.

2. Inverness Forest Association, Inc. is a Maryland homeowners association. The community consists of 304 townhouses on 33 acres. Seven (7) acres are developed and the remaining acres are wooded common areas. Complainant's above described property is located within the boundaries of the association and is subject to the Declaration of Covenants, By-laws, Articles of Incorporation and Rules and Regulations pertaining to the association.

3. Complainant's property is an interior townhouse. Complainant's access to his rear yard is either through the inside of his townhouse or by an unimproved path over the common areas owned by Inverness Forest Association, Inc.

4. The portion of the common areas of the Respondent association which abut Complainant's rear yard are not maintained by the association. Complainant desires to improve and maintain the common areas along the fence behind his house and his neighbor's house (the neighbor's house is an end unit) to the point where it reaches an asphalt path maintained by the Respondent association to make the common areas passable for a rolling cart. Complainant would use the rolling cart to transport items to his rear yard including garden materials and his trash containers. The asphalt path maintained by Respondent association is approximately 40 feet from

the rear of Complainant's property .

5. According to a letter from Complaint's doctor, A. Kaldun Nossuli, M.D., Complaint suffers from the following illnesses:

- a. Coronary artery disease;
- b. Conjestive heart failure;
- c. Diabetes;
- d. Duodenal ulcer;
- e. Kidney transplant, May 2001.

Complaint's doctor has instructed him not to lift anything greater than 10 pounds. Complainant therefore wishes to make the area behind his property passable for use by a rolling cart to carry garden materials and other items to his backyard and to bring his trash containers back and forth from the rear to the front of his property. The path borders on a ravine and is eroded to the point where it might have to be improved in order to be usable for a rolling cart.

6. Complainant says that in July 2001 he had a conversation with Kevin Myers, Chairman of the Grounds Maintenance Committee of Respondent association, about improving access to his backyard in the abutting common areas. Complainant contends that Kevin Myers advised Complainant that he did not need to obtain permission from the Respondent association in order to make the desired improvements to the common areas at the rear of Complainant's property.

7. Kevin Myers disputes Complainant's version of the July 2001 conversation. Mr. Myers testified that he and the Complainant discussed only installing a gate at the back of Complainant's property and that he advised Complainant that Complainant did not need approval for the gate as long as he conformed the gate to the design of his present fence. Kevin Myers denies that he told Complainant that no permission was necessary from the association to make the Complainant's intended improvements and modifications to the common area behind Complainant's

property. The testimony of Eugenia Perros, Vice President of the association, confirmed that in the few instances where changes on the common areas have been allowed, it was only after application to the Board of Directors, and receipt of written approval.

8. After his conversation with Kevin Myers, Complainant began to make the desired improvements and modifications to the common areas at the rear of his property. He did not apply for or receive permission from the Board of Directors before he started.

9. There was some dispute whether the area involved was owned by the Complainant, Complainant's neighbor, the association or a combination of them. The survey attached as Exhibit A shows that the area in question is entirely common areas owned by Inverness Forest Association.

10. Complainant has filed in the record a letter dated February 13, 2002 from Yuri Olkhovsky, a friend of the Complainant who states that he heard the conversation between Complainant and Kevin Myers in July 2001. Mr. Olkhovsky states that Complainant's explanations to Mr. Myers consisted of description of both the improvements of the common areas behind the Complainant's property as well as the improvements connected with putting in a gate. Mr. Olkhovsky states that he was later on the telephone when Kevin Myers called Complainant and advised him that there was no need to write a letter to the Board asking for prior approval of the work which Complainant intended to do. Kevin Myers agrees that he advised the Complainant that he did not need approval for the gate as long as it conformed to the design of his present fence, but Mr. Myers says that was the extent of the conversation in July of 2001 and that there was not any mention of a pathway by him or the Complainant.

11. By letter dated March 22, 2002 (R64), the Respondent association advised Complainant that it wished to reach a reasonable accommodation regarding Complainant's medical

situation. Respondent asked Complainant to provide further information to allow the Board to assess “How your requested accommodation is related to your disability”. In particular, Respondent association asked whether there are any alternate accommodations which would meet Complainant’s needs other than improvements and modifications of the common areas behind his property.

12. The Respondent association said in its letter of March 22, 2002 that due to the forested setting of Inverness Forest, there are many homes in the community which were built without access to the rear of their property from the parking areas. The testimony of Eugenia Perros, Vice President of the association, was that approximately 1/3 of the 304 townhouses have no rear access by way of maintained, improved paths. Complainant’s property is one of the townhouses without access.

13. Complainant has said in the record (R-111) that he has filed a case with the Montgomery County Office of Human Rights claiming discrimination against him by the Respondent association on the basis of Complainant’s handicap and the failure to provide Complainant with a reasonable accommodation. The panel was not advised of the status of this case.

14. The front entrance to Complainant’s townhouse is several steps up from the grade level of the parking lot in the front of Complainant’s townhouse. The entrance is to the second floor of the townhouse. The rear entrance/exit to Complainant’s townhouse is from the first floor. The first floor is slightly below grade at the front of the townhouse and the rear entrance/exit is at grade level. At the front of the townhouse, there is a sliding glass door with a railing in front of it which opens into the kitchen. The level of the threshold of the sliding glass door is approximately two feet above grade at that point.

15. There is sufficient area in the front of Complainant's townhouse to contain an enclosure for Complainant's trash containers. There is also sufficient area to construct a ramp in Complainant's front yard up into the kitchen access through the sliding glass doors.

16. As a reasonable accommodation to Complainant in light of his physical handicaps, the association offered to allow Complainant either to build a structure in his front yard to house his trash containers or to build a ramp in his front yard to allow him to wheel his trash containers into his kitchen. Complainant has a balcony on the rear of his property; there are several unit owners in the community who keep their trash containers on their balcony until it is time to bring them out for the trash pick up which is once per week. Complainant declined both of these accommodations. The testimony at the hearing was that approval of a structure to house the trash containers would require Board of Directors' action, but that there is at least one other unit in the community which has such an enclosure at the front of its property.

17. The association has no written dispute resolution procedure for disputes of this type; it did not conduct a hearing at which Complainant could appear and present evidence and the testimony of witnesses; and it delayed several months before it advised Complainant clearly in writing that his actions were not permitted and how to remedy the violation. These failure may have exacerbated the situation, although the panel is aware from the testimony and evidence of record that Complainant proceeded with construction on his own without seeking approval or giving notice, and that the association's first notice of Complainant's action was only after it had been partially completed.

### **CONCLUSIONS OF LAW**

1. Article V of the Declaration of Covenants, Conditions and Restrictions for the association provides that there shall be no exterior addition to or change or alteration “upon the properties” until plans and specifications therefore have been submitted to the Board of Directors or an architectural committee appointed by the Board and approved in writing. Use of the term “properties” suggests that this provision applies not only to the lots but to the common areas of the association. Even if “properties” does not encompass the common areas of the association because the area in question in this case is common areas owned by the association, prior approval by the association of the type of activity contemplated by the Complainant is required.

2. Complainant did not obtain, or even seek approval by the Board of Directors for the work which he commenced. Under the documents, even if testimony of Complainant regarding a conversation with Kevin Myers, Chairman of the Grounds Maintenance Committee, is credited, nevertheless Kevin Myers did not have authority to grant Complainant approval to do the work in question. The testimony of record, including the testimony and letters by Kevin Myers and by Complainant and by Professor Yuri Olkhovsky, taken in their most favorable light to Complainant, do not meet Complainant’s burden of proof to establish that Kevin Myers made statements upon which Complainant justifiably relied in taking the actions which he took.

3. There was no dispute that Complainant suffers from a handicap as a result of his physical condition. Under the Fair Housing Amendments Act of 1988 therefore, the association would be obliged to permit, at the expense of the Complainant, as a handicapped person, reasonable modifications of the existing premises occupied by him. 42 USC Section 3604. Alternatively, the association would be obliged to make a reasonable accommodation in its rules, policies, practices

or services when such accommodations may be necessary to afford Complainant as a handicapped person equal opportunity to use and enjoy his dwelling unit. 42 USC Section 3604. However, Complainant's situation is no different than that of the approximately one hundred other unit owners in the Respondent association who do not have access to their property through their rear yards except by unapproved foot paths or through wooded areas. His handicap is not the reason he does not have the rear access to his property he desires.

4. The association offered Complainant several opportunities to make reasonable modifications to his property which Complainant refused. Specifically, the association would allow and would approve a structure at the front of Complainant's property to house his trash containers and would make whatever modifications in its policies that were necessary to approve that structure. The association also offered to allow Complainant to construct a ramp.

5. The panel specifically finds that construction/modification of the common areas at the rear of Complainant's property would not be a reasonable modification or a reasonable accommodation. It is not reasonable to require the association to assume the liability and risk for maintenance of an area which it has chosen not to maintain for the entire 30 plus years of its existence. There was no evidence to indicate that Complainant could satisfactorily assume the responsibility and liability if such common areas were changed/modified as proposed. Even if he could, the association offered other alternatives which were reasonable and it should not be required to modify its site plan and policies so long as those alternatives are available.

6. As noted in the Findings of Fact above, the association has no dispute resolution procedure for disputes of this type and offered Complainant no hearing or other process to resolve this dispute. The panel believes that the association should adopt a dispute resolution procedure



including notice and an opportunity to be heard when this type of dispute arises. Such a procedure, properly promulgated to the residents, might prevent this type of dispute in the future and would certainly afford the residents a fairer opportunity to be heard. Before the close of the record, at the request of the panel the Respondent association submitted its Architectural Control Resolution adopted October 2001, as amended. This document has some appeal procedures regarding architectural control matters but those procedures do not precisely apply to this type of dispute. There was no indication whether or not these procedures have been filed in the homeowners association depository in the Office of the Clerk of the Circuit Court for Montgomery County, Maryland. Naturally they would have to be filed in order to be enforceable.

#### **ORDER**

Based upon the foregoing Findings of Fact and Conclusions of Law it is this 4<sup>th</sup> day of February, 2003

#### **ORDERED:**

1. Complainant must remove all materials, construction, modifications and changes which he has made to the common areas behind his property within 90 days from the date of this order. If he fails to do so, then Respondent association may remove them at Complainant's expense. Before Respondent association takes any action on its own to remove these items it must obtain an estimate and give Complainant a copy of the estimate 30 days prior to the beginning of any action to remove these items.

2. The panel does not specifically order Respondent association to do so, but it recommends strongly that Respondent association consider the adoption of general dispute resolution procedures which would encompass disputes of this type.

3. Respondent association has requested an award of attorney's fees under Section 10B-13(d). The panel does not conclude based on the evidence of record that this dispute was frivolous or maintained other than in good faith and therefore declines to award attorney's fees against Complainant. The panel is of the opinion that the level of conduct justifying an award of attorney's fees would have to be more egregious than what is present here.

4. Whether the common areas behind Complainant's property are to be left in their natural state lies entirely within the discretion and business judgment of the Respondent.

The decision of the panel is unanimous (2-0). Any party aggrieved by the action of the Commission may file an appeal to the Circuit Court of Montgomery County, Maryland within thirty (30) days after the date of entry of this Order in accordance with the Maryland Rules of Procedure.

  
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John F. McCabe, Jr., Panel Chair  
Commission on Common Ownership Communities

\*Panel member Arlene Perkins did not participate in the hearing or decision.